

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TONY ROBERTS, an individual,

Plaintiff,

v.

J. BEARD, et al.,

Defendants.

Case No.: 15cv1044-WQH-RBM

**ORDER**

HAYES, Judge:

The matter before the Court is the Motion for Temporary Restraining Order/or Preliminary Injunction filed by Plaintiff Tony Roberts. (ECF No. 138.)

**I. BACKGROUND**

On May 8, 2015, Plaintiff Tony Roberts, a state prisoner proceeding pro se, initiated this action by filing a Complaint pursuant to 42 U.S.C. § 1983 against Defendants A. Buenrostro, R. Davis, C. Meza, A. Parker, R. Santiago, K. Seibel, and R. Solis for violations of Plaintiff's First Amendment rights and his Eighth Amendment right to be free from cruel and unusual punishment. (ECF Nos. 1, 2.)

On January 9, 2018, Defendants filed a motion for summary judgment on grounds that: (1) Plaintiff failed to exhaust all claims except retaliation against Defendant Buenrostro regarding the April 2, 2014 rules violation report; (2) Defendants are entitled to summary judgment as to Plaintiff's exhausted retaliation claim; (3) the evidence

1 demonstrates that Defendant Buenrostro did not violate Plaintiff's Eighth Amendment  
2 rights; (4) no private right of action exists under state law; and (5) Defendants are entitled  
3 to qualified immunity. (ECF No. 116.) On January 22, 2018, Plaintiff filed an opposition  
4 to the motion for summary judgment. (ECF Nos. 119, 120.)

5 On September 24, 2018, the Court adopted a Report and Recommendation issued by  
6 the Magistrate Judge (ECF No. 130) in its entirety. The Court granted summary judgment  
7 as to the Eighth Amendment claim, and as to the exhausted retaliation claim from the April  
8 2, 2014 rules violation report. (ECF No. 136.) The Court remanded to the Magistrate  
9 Judge for an evidentiary hearing to determine whether the prison improperly failed to  
10 process Plaintiff's alleged grievances on April 2, 2014; June 23, 2014; and July 8, 2014.  
11 The Court denied summary judgment as to exhaustion, qualified immunity, and state law  
12 grounds, without prejudice and with leave to refile following the evidentiary hearing.

13 Plaintiff's remaining claims include retaliation for engaging in First Amendment  
14 conduct and causes of action arising under California law. The evidentiary hearing is set  
15 for November 28, 2018. (ECF No. 139.)

16 On October 1, 2018, Plaintiff filed a Motion for Temporary Restraining Order/or  
17 Preliminary Injunction. (ECF No. 138.) Plaintiff moves the Court for a temporary  
18 restraining order or preliminary injunction "prohibiting California Department of  
19 Corrections and Rehabilitation's (CDCR Secretary from re-housing Plaintiff Tony Roberts,  
20 at Richard J. Donovan Correctional Facility (RJDCF), in Sa Diego, California for purposes  
21 of attending trial in the pending litigation." *Id.* at 3–4.

22 Plaintiff asserts that "any re-housing of him at RJDCF for any proceeding in this  
23 matter would place him at a serious risk of harm." *Id.* at 5. Plaintiff provides a declaration  
24 stating that correctional officers, including Defendants Buenrostro and Meza, are arranging  
25 for "members of California's most violent Hispanic prison gang . . . to have [Plaintiff]  
26 murdered as revenge for the pending lawsuit." *Id.* at 9. The declaration states that gang  
27 members "brandish[ed] weapons and threaten[ed]" Plaintiff in February of 2017, after  
28 which Plaintiff "sought a place of safety in the Mental Health Crisis Bed." *Id.* at 9–10.

1 Plaintiff asserts that “any re-housing of him at RJDCF for purpose of Mr. Roberts being  
2 transported back and forth to court for the evidence hearing . . . would pose an unreasonable  
3 risk to his future health and safety.” *Id.* at 5.

4 **II. DISCUSSION**

5 Federal Rule of Civil Procedure 65(b)(1) provides that

6 The court may issue a temporary restraining order without written or oral  
7 notice to the adverse party or its attorney only if:

- 8     (A) specific facts in an affidavit or a verified complaint clearly show  
9         that immediate and irreparable injury, loss, or damage will result to the  
10         movant before the adverse party can be heard in opposition; and  
11     (B) the movant’s attorney certifies in writing any efforts made to give  
12         notice and the reasons why it should not be required.

13 Fed. R. Civ. P. 65(b)(1).

14 In this case, Plaintiff provides a declaration of service by U.S. mail, indicating that  
15 he served the motion on the opposing parties. *Id.* at 12. Plaintiff has failed to demonstrate  
16 that “immediate and irreparable injury” will result if the Court does not issue a temporary  
17 restraining order “before the adverse party can be heard in opposition.” Fed. R. Civ. P.  
18 65(b)(1)(A). Plaintiff has failed to comply with the requirements of Rule 65(b)(1). *Reno*  
19 *Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (quoting *Granny*  
20 *Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438–39 (1974)) (“The stringent restrictions  
21 imposed . . . by Rule 65 on the availability of *ex parte* temporary restraining orders reflect  
22 the fact that our entire jurisprudence runs counter to the notion of court action taken before  
23 reasonable notice and an opportunity to be heard has been granted both sides of a dispute.”).  
24 The motion for a temporary restraining order is denied.

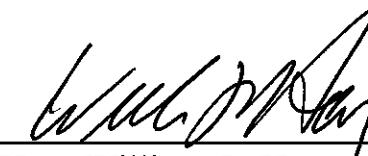
25 Rule 65(a) provides that “The Court may issue a preliminary injunction only on  
26 notice to the adverse party.” Fed. R. Civ. P. 65(a)(1). Plaintiff’s motion for a preliminary  
27 injunction remains pending. Defendants shall file any opposition to the motion for a  
28 preliminary injunction on or before October 18, 2018. Plaintiff shall file any reply on or  
before October 25, 2018. The Court will rule thereafter.

1           **III. CONCLUSION**

2           IT IS HEREBY ORDERED that the motion for a temporary restraining order (ECF  
3 No. 138) is DENIED.

4           IT IS FURTHER ORDERED that Defendants shall file any opposition to the motion  
5 for a preliminary injunction on or before October 18, 2018. Plaintiff shall file any reply on  
6 or before October 30, 2018. The motion for a preliminary injunction remains pending.  
7 (ECF No. 138).

8           DATED:     10/15/18

  
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Hon. William Q. Hayes  
United States District Judge

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